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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES W. SIEG, Plaintiff and Appellant, v. CITY OF LAGUNA BEACH, Defendant and Respondent.	G056482 (Super. Ct. No. 30-2017-00959370) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Law Offices of William B. Hanley and William B. Hanley for Plaintiff and Appellant.

Woodruff, Spradlin & Smart, Daniel K. Spradlin, Roberta A. Kraus and Gregory E. Bullard for Defendant and Respondent.

INTRODUCTION

James Sieg appeals from a judgment of dismissal after the demurrer of the City of Laguna Beach (the City) was sustained without leave to amend. Sieg alleged he injured himself while moving heavy ceramic planters from a city street after a City employee, Bob Koch, told him to remove them so that the City could perform maintenance on the street in front of Sieg's house. There is no dispute that the planters belonged to Sieg, not to the City, nor that they were on city property: the street.

We affirm the judgment. Koch's instruction to Sieg to remove the planters did not create the special relationship necessary for a duty of care to arise between the City and Sieg. Removing private property from a public street is not part of the public function of street maintenance, and nothing in Sieg's first amended complaint establishes that Koch's instruction to him induced his detrimental reliance, increased his risk of harm, or lulled him into a false sense of security.

FACTS

According to the allegations of the first amended complaint, the street in front of Sieg's house was scheduled for maintenance in November 2016, the maintenance consisting of slurry-coating the street. On the late afternoon before the maintenance was due to take place, Koch told Sieg that some heavy ceramic planters Sieg had placed on the street had to be removed before morning. Sieg alleged that the planters had been in place for over 20 years. Sieg, who was at the time 78 years old, told Koch that the planters were too heavy to move. Koch refused to assist Sieg in removing the planters. Sieg attempted to remove them himself, fell, and was injured. He sued the City for negligence.

The trial court sustained the City's demurrer to the first amended complaint without leave to amend, as Sieg's counsel disclaimed any intention of amending. The trial court reasoned that Sieg had not alleged facts establishing a "special relationship"

between Sieg and a public employee (i.e., Koch) that would support a duty of care to Sieg. The judgment of dismissal was entered on June 20, 2018.

DISCUSSION

"In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we must assume the truth of all facts properly pleaded by the plaintiff-appellant. Regardless of the label attached to the cause of action, we must examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. . . . [¶] We will not, however, assume the truth of contentions, deductions, or conclusion of fact or law and may disregard allegations that are contrary to the law or to a fact which may be judicially noticed." (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1554-1555.) We affirm a judgment based on the sustaining of a demurrer on any properly supported ground, regardless of the trial court's reasons. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111.)

Government Code section 815.2, subdivision (a), provides, "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." So the issue before us turns on whether Koch's act of telling Sieg to remove his planters would have given rise to a cause of action against Koch.

Both parties agree that the answer to this question depends on whether there was a "special relationship" between Koch and Sieg. The special relationship doctrine requires that the public employee "had assumed a duty [to the injured individual] greater than the duty owed to another member of the public" in order for the public agency to be liable. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 206 (*Davidson*).)

A public employee assumes this greater duty in a few well-settled ways: "'detrimental reliance by the plaintiff on the [employee's] conduct [or] statements made

by [the employee] which induced a false sense of security and thereby worsened [the plaintiff's] position' [citation] . . . [or] an affirmative act that increased the risk of harm to [the plaintiff]." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1130 (*Zelig*).) A special relationship may also arise if a public employee "voluntarily assumes a duty to provide a particular level of protection, and then fails to do so." (*Id.* at p. 1129.)

The special relationship rule is "is narrow, to be applied in a limited class of unusual cases." (*Minch v. Department of California Highway Patrol* (2006) 140 Cal.App.4th 895, 905.) Cases in which plaintiffs have tried to allege facts establishing a special relationship bear out this observation. For example, in *Zelig, supra*, the children of a woman whose estranged husband shot her in the county courthouse while they were in the midst of a family law proceeding sued the county for failing to protect her. They alleged the woman had told the courtroom bailiff and the family law judge several times that her husband had threatened to kill her and that she had a restraining order against him. (*Zelig, supra,* 27 Cal.4th at p. 1119.) The court upheld the sustaining of the county's demurrer, ruling that there was no special relationship between the court employees or the sheriff's deputies present at the scene and the murdered woman. They had not created her peril or increased it. They had not undertaken special duties to protect her or done anything to induce her to rely on a promise of special protection. (*Id.* at p. 1130.)

In *Davidson, supra,* the police had a laundromat under surveillance after several stabbings had taken place nearby. As the police watched, a man entered and left the laundromat several times, finally returning to stab the plaintiff. (*Davidson, supra,* 32 Cal.3d at p. 201.) The court held there was no special relationship between the surveilling officers and the plaintiff; they did not create the peril to her, she did not rely on them for protection, and their conduct did not change the risk to her. (*Id.* at p. 208.)

Both parties rely heavily on *Walker v. County of Los Angeles* (1987) 192 Cal.App.3d 1393 (*Walker*), in their arguments regarding a special relationship. As the

Walker court observed, "The central question in this case is whether a 'special relationship' is created when a public employee asks a private citizen to assist the employee in performance of a public function which involves a foreseeable risk of injury." (*Id.* at p. 1399.)

In *Walker*, the county received a telephone call that two stray dogs were roaming about. The county dispatched an animal control officer to catch the dogs. The officer caught one of them, but could not catch the other. The caller then suggested that her son-in-law could help to catch the second dog. He did catch the dog, but the dog bit him. (*Walker, supra,* 192 Cal.App.3d at p. 1395.)

The reviewing court reversed the summary judgment granted to the county, finding at least a triable issue of fact as to whether the animal control officer had established a special relationship with the injured plaintiff by asking him to help to catch the dog. "[T]his is a case where the public employee personally asked an individual private citizen to discharge a public function ordinarily entrusted to that employee." (*Walker, supra,* 192 Cal.App.3d at pp. 1402-1403.) In addition, going after the dog carried a "foreseeable risk of injury and thus created a 'special relationship.'" (*Id.* at p. 1402.)

In this case, both parties agree that the main issue is whether Sieg has alleged sufficient facts to establish a special relationship between himself and Koch. The resolution of this issue in turn rests on whether removing private property from a street is part of the public function of street maintenance. The City contends that it is not. Sieg asserts that Koch enlisted him to help with a public function, street maintenance, when Koch told Sieg to remove the planters.

We agree with the City. Removing private property from a street is not part of the City's job in preparing a street for slurry-coating.[1] It is not "a public function

[1] The record does not explain how Sieg's private property – the planters – had come to be installed on a public street.

ordinarily entrusted to [a public] employee," (*Walker, supra,* 192 Cal.App.3d at pp. 1402-1403), as opposed to catching stray dogs, which *is* a public function ordinarily entrusted to an animal control officer. Similarly, notifying residents that street maintenance was imminent – for example, by setting up no-parking signs the day before – might be considered part of the preparation for street maintenance. But the City's street maintenance employees would not be in charge of actually moving the parked cars. So too in this case. Sieg alleged no facts establishing that Koch did anything to induce Sieg's detrimental reliance, to lull him into a false sense of security, or to promise a particular level of protection and then fail to provide it. Telling Sieg to remove his planters did not increase his peril; Sieg did not allege that Koch told him he had to remove the planters himself or that Koch gave him any instruction whatsoever as to how this task should be accomplished. Sieg decided on his own how to move the planters.[2]

In addition, assisting with the public function must create a "foreseeable risk of injury," such as being bitten by a stray dog one is chasing. (See *Walker, supra,* 192 Cal.App.3d at p. 1402.) The public function in this case is street maintenance, specifically slurry-coating the street. Although it is possible to imagine foreseeable injuries caused by slurry-coating, injuries caused by removing planters are not among them. If, for example, Sieg had parked his car on the street, and Koch told him to move it so the slurry coating could be applied, a "foreseeable risk of injury" would not include Sieg's running his car into a wall in the process. Injuries from this kind of conduct – removing planters or crashing a car – are too remote from street maintenance to be reasonably foreseeable. (See *McCollum v. CBS, Inc.* (1988) 202 Cal.App.3d 989, 1005.)

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[2] In his reply brief, Sieg quotes extensively from *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252 (*McCorkel*), to support an argument that who owned the planters was immaterial for special relationship purposes. (~**(ARB at 6-7)**~ The issue in *McCorkle* was whether a police officer accused of negligence in handling a traffic accident was immune, not whether there was a special relationship. (*Id.* at pp. 260-261.) A case is not authority for a proposition it does not consider. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372.)

DISPOSITION

The judgment of dismissal is affirmed. Respondent is to recover its costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.